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UNFAIR DISMISSAL
I'VE BEEN SACKED WHAT CAN I DO?

EMPLOYMENT LAW
FAIR WORK

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I'VE BEEN SACKED - WHAT CAN I DO? 10 THINGS YOU NEED TO CONSIDER

Getting sacked is almost always a distressing experience. Whatever your circumstances, there are things you should know and do.

1. Did you get the right amount of notice?

There are minimum notice periods your employer must give you when sacking you, depending on how long you've continuously worked there.

Your employer may require you to serve out the notice period or may choose to end your employment with immediate effect or pay you an amount in lieu of notice.

The minimum notice entitlements under the *Fair Work Act 2009* (**the Act**) are:

Period of employee's service	Required period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 week
More than 3 years but not more than 5 years	At least 3 week
More than 5 years	At least 4 weeks

If you are over 45 years of age and have worked for the employer for at least two years then you are entitled to an extra weeks' notice.

Check your Contract and any award that applies to your employment as they may require that you be given longer periods of notice than the minimum periods.

The only exception to the requirement to give you notice is if you have been sacked for serious misconduct. The Act defines "serious misconduct" to include theft, fraud, committing an assault, being intoxicated at work, behaving in a way that causes serious and imminent risk to the health and safety of a person or to the reputation or viability of the business, or refusing to carry out a lawful and reasonable instruction.

1. Did you get paid your accrued entitlements?

In addition to any notice, you must also be paid for any accrued annual leave entitlements and, in for employees with significant periods of service, long service leave entitlements.

2. Do you want to lodge a claim or complaint?

You may want to consider lodging a claim that you were unfairly or unlawfully dismissed.

There are several possible forms of legal action open to you, but usually the quickest, cheapest and most practical way of making a claim of unfair dismissal is to lodge an application with the Fair Work Commission (**FWC**) and this is the sole remedy we will discuss in this forum.

Exclusions

The most important thing to remember is that an application must be lodged with the FWC registry no later than **21 days** after the date of termination of your employment.

The unfair dismissal provisions do not apply if:

- Your employer has 15 employees or less – within 12 months of your commencing employment; and
- Your employer has more than 15 employees - within 6 months of your commencing employment.

If you earn more than $138,900.00 gross per annum (current as at 1 July 2016, but subject to annual indexation) and your employment is not subject to an award or enterprise agreement then you are excluded from bringing unfair dismissal action.

Grounds

A dismissal will be unfair if it:

- was harsh, unjust or unreasonable;
- was not consistent with the Small Business Fair Dismissal Code (if the employer has less than 15 employees); or
- was not a case of genuine redundancy.

The criteria for deciding whether a dismissal was harsh, unjust or unreasonable, set out in section 387 of the Act include:

1. whether there was a valid reason for the dismissal related to the person's capacity or conduct;
2. whether the person was notified of that reason;
3. whether the person was given an opportunity to respond to the reason;
4. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;
5. if the dismissal related to unsatisfactory performance – whether the person had been warned about the unsatisfactory performance before the dismissal;
6. The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal;
7. The degree to which the absence of any dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
8. Any other matters that the FWC considers relevant.

In considering the meaning of the words "harsh, unjust or unreasonable" a common sense approach is adopted. Employers are required to give employees "a fair go".

Procedural fairness/substantive fairness

The FWC must consider whether your dismissal was both procedurally fair and substantively fair.

Matters to be taken into account in determining whether your dismissal was "procedurally fair" include:

- Were you given enough details of the allegations against you?
- Were you given an appropriate opportunity to respond?
- Was your response was taken into account by your employer before a decision was made?
- Did it appear that your employer had pre-judged the matter? E.g. did they have a letter terminating your employment in their possession before the meeting commenced?

After considering whether a dismissal was procedurally fair, the FWC will then consider whether the dismissal was substantively fair.

Remedy

The FWC may order reinstatement unless it is impracticable to do so – in practice reinstatement is rarely granted.

The more usual form of remedy is compensation of an amount equivalent to your last six (6) months wages. You have a duty to mitigate your loss, i.e. you have to make efforts to find other employment. The FWC may reduce the amount awarded to you if you can't establish that you have made an effort to find other employment.

Costs

Usually each party bears their own costs. The FWC can award legal costs if a claim is frivolous or vexatious or either party has acted in an unreasonable manner during the conduct of the claim. In most instances it is necessary for the dismissed employee to pay for legal costs they have incurred out of any amount awarded to them by the FWC.

Filing

There is a small filing fee payable on the application (currently $69.90). The application should set out the grounds and facts relied on for the application. The form can be downloaded from www.fwc.gov.au and may be filed in person, by post, by facsimile or by email, as long as it is lodged within the time limit. The FWC will send a copy of the application to your employer.

Conciliation Conference

After filing and service of the application the FWC will usually convene a conciliation conference of the parties which is mostly held by telephone with a conciliator. You can expect that the conference will be conducted within four weeks of the application being filed. At the conference the conciliator will ask each party to provide a summary of their position, hearing from the employee first, and will then assist the parties in trying to resolve the matter. Generally anything said during the conference is confidential and cannot be raised before the FWC at hearing.

Pre-hearing

If the matter cannot be resolved at the conference, it will be given a date for hearing and directions will be made about steps to be undertaken by the parties before the hearing.

The evidence each party introduces in support of their position is given by written witness statement. The other party can then require that any witness making a statement attend the hearing to be orally cross examined.

Hearing

Unfair dismissal claims are heard by a single member of the FWC. After the evidence is presented by each party, closing submissions can be made. It is no usual for decisions to be made immediately following the hearing, but rather they are "reserved" and after a period of several weeks the FWC will deliver its decision in writing.

Case examples

Procedural fairness

In Mulhall v Direct Freight (Qld) Pty Ltd [2016] FWC 58 Mr Mulhall, a truck driver, was alleged to have stolen a package containing a laptop computer which should have been delivered to Harvey Norman in March 2015. The employer relied upon CCTV footage to come to the conclusion that Mr Mulhall stole the package. However, despite Mr Mulhall's requests to view the footage, it was not shown to him at either disciplinary meeting. The FWC accepted Mr Mulhall's submission that the evidence was "flimsy" and found that the employer had been unable to discharge its onus to satisfy the FWC on the balance of probability that Mr Mulhall had actually engaged in the conduct alleged. In the two videos relied upon by the employer, two different boxes were identified as the stolen package by separate witnesses. There was no clear evidence to prove that Mr Mulhall stole the package. It was also found that Mr Mulhall was denied procedural fairness as he was not given the opportunity to view the footage upon which the employer relied and make a response before he was terminated. The FWC held the dismissal to be unjust and unreasonable and ordered the employer to pay Mr Mulhall $25,468.13 gross.

Substantive reason

In Smith v Aussie Waste Management Pty Ltd [2015] FWC 1044 Mr Smith, a garbage truck driver swore at his manager, saying "you dribble sh#t, you always dribble f#&king sh#t". The employer dismissed Mr Smith for this conduct. The FWC accepted that Mr Smith swore at his manager, but overturned the employer's decision and found that while this type of conduct shouldn't be tolerated, it was not "sufficiently insubordinate" to justify dismissal. In making this decision it was considered that:

- the type of language was not uncommon in the workplace;
- the conversation was not overheard by other employees, and
- the worker didn't intend to undermine his manager's authority in the workplace.

The FWC accepted that attitudes towards swearing have changed over time:

"[t]here is no doubt that workplaces are more robust in 2015, as they relate to the use of swearing, than they were in the 1940s. Further, I would not consider it uncommon for bad language to be used in the workplace in this or other similar industries."

In Rikihana v Mermaid Marine Vessel Operations Pty Ltd [2014] FWC 6314, the dismissal of Mr Rikihana, a wharf worker, for swearing was upheld. Mr Rikihana had repeatedly engaged in unjustified swearing, which was described as "contemptuous and aggressive". Although it was agreed that traditionally, swearing was part of wharf workers' everyday vocabulary, the FWC viewed this accepted, everyday behaviour as distinct from swearing aggressively and maliciously at another person. In light of this, the FWC decided dismissal was the appropriate penalty. Significantly, in this case, the employer had recently attempted to improve the workplace culture by implementing a new code of conduct aimed at improving the standard of communication between workers.

Application out of time

In Jones v Bunnings Warehouse [2016] FWC 1255 Mr Jones was dismissed on 18 December 2015, but did not lodge an unfair dismissal application with the FWC until 10 January 2016 (23 days). Mr Jones had a reasonable explanation for the delay, namely his evidence of the impact of his depression following the termination of his employment, combined with his need to leave Australia urgently to fly to the UK to deal with his father's terminal illness. The FWC was satisfied that the need for Mr Jones to urgently travel to the UK to tend to his father's terminal illness, together with his recognised mental health issues was a reasonable explanation for the delay. Further the absence of any of prejudice to Bunnings meant there were exceptional circumstances. A time extension was granted

In Meek v Baycorp Pty Ltd [2016] FWC 1291 Mr Meek's employment with Baycorp was terminated on 15 January 2016. Mr Meek lodged an unfair dismissal application on 9 February 2016 (25 days). Mr Meek strongly disputed the fairness of his dismissal at the time of the termination of his employment and argued there was no prejudice to Baycorp in the late lodgement of his application. Mr Meek did not put forward any reasonable explanation for his delay in lodging his application. The FWC refused to grant Mr Meek's application for an extension of time and his unfair dismissal application was dismissed.

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